LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 8 1965
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of The United States

October Term, 1964

No. 887

THE NEW YORK CENTRAL RAILROAD COMPANY,
a Corporation,

*Petitioner,*

*v.*

SOUTHERN RAILWAY COMPANY,
a Corporation,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RICHARD J. MURPHY
*Attorney for Petitioner,*
The New York Central
Railroad Company
1225 LaSalle Street Station
Chicago, Illinois 60605

McCORMICK AND HENDERSON, INC., CHICAGO

# INDEX


PAGE

CITATIONS TO OPINION BELOW ..... 1

JURISDICTION ..... 1

QUESTIONS PRESENTED ..... 2

STATUTE INVOLVED ..... 2

STATEMENT ..... 3

REASONS FOR GRANTING THE WRIT ..... 7

CONCLUSION ..... 13


## INDEX TO APPENDIX


APPENDIX A

Opinion and Judgment of the United States District Court, Northern District of Illinois, Eastern Division, dated February 5, 1964, reported at 226 F. Supp. 463 ..... A 1

APPENDIX B

Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit, dated November 24, 1964, reported at 338 F. 2d 667 ..... A 28

APPENDIX C

Paragraphs 18 to 22 of Section 1 of the Interstate Commerce Act [49 U.S.C. §§1(18) to (22)] ..... A 31

Paragraph 9 of Section 1 of the Interstate Commerce Act [49 U.S.C. §1(9)] ..... A 35

APPENDIX D

Table setting forth findings as to length of track and cost of construction in Section 1(18) cases [49 U.S.C. §1(18)] ..... A 36 - A 37

Chicago, M. St. P. & P. R. Co. v. Chicago & E. I., R. Co., 198 F.2d 8 (7th Cir. 1952)

Chicago, Milwaukee, St. P. & P. R. Co. v. Northern Pac. R. Co. 120 F. Supp. 710 (W.D. Wash. 1954) aff'd per curiam 225 F. 2d 840 (9th Cir. 1955)

Chicago, Milwaukee, St. Paul & Pacific R. Co. v. United States, 214 F. Supp. 244 (D.C. E.D. Wisc. 1963) probable jurisdiction noted March 9, 1964, 376 U.S. 941

Chicago, Rock Island & Pac. R. Co. v. Chicago & N. W. Ry. Co., 188 F. Supp. 549 (S.D. Ill. 1960)

Chicago, R. I. & P. R. Co. v. Illinois Commerce Commission, ex rel. Illinois Cent. R. Co., 111 N.E. 2d 136 (Sup. Ct. Ill. 1953)

Chicago, Rock Island & Pacific Railroad Co. v. United States, 205 F. Supp. 378 (D.C. N.D. Ill., E. D. 1962)

Detroit & M. Ry. Co. v. Boyne City G. & A. R. Co., 286 F. 540 (E.D. Mich. 1923)

El Dorado & W. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 5 F. 2d 777, (8th Cir. 1925)

State of Georgia v. United States, 156 F. Supp. 711 (N.D. Ga. 1957), aff'd per curiam 356 U.S. 273 (1958)

Missouri K. & T. R. Co. v. Texas & N. O. R. Co., 172 F. 2d 768 (5th Cir. 1949)

Missouri Pac. R. Co. v. Chicago, R. I. & P. Ry. Co., 41 F. 2d 188 (8th Cir. 1930)

Missouri Pac. R. Co. v. St. Louis Southwestern Ry. Co. 73 F. 2d 21 (8th Cir. 1934)

New York Central R. Co. v. Chicago & Eastern Ill. R. Co., 222 F. 2d 828 (7th Cir. 1955)

New York Central v. Norfolk & Western Ry. Co., 214 F. Supp. 549 (S.D. W. Va. 1963)

Pennsylvania Railroad Co. v. Reading Company, 132 F. Supp. 616 (D.C. E.D. Pa., 1955), aff'd per curiam 226 F. 2d 958 (3rd Cir. 1955)

Southern Pac. Co. v. Western Pacific California R. Co., 61 F. 2d 732 (9th Cir. 1932)

Texas & Pac. Ry. v. Gulf, etc., Ry., 270 U.S. 266 (1926)

Union Pac. R. Co. v. Denver & Rio Grande Western R. Co., 198 F. 2d 854 (10th Cir. 1952)

## Table of Authorities

### Cases

PAGE

Cleveland, C. C. & St. L. Ry. Construction and Operation, 228 I.C.C. 461 (1938) ..... 4

Cleveland, C. C. & St. L. Ry. v. United States, 275 U.S. 404 (1928) ..... 11

Dering Coal Co. v. C., C., C & St. L. Ry. Co., 96 I.C.C. 143; 109 I.C.C. 55 (1926), aff'd sub nom. Cleveland, C. C. & St. L. Ry. v. United States, 275 U.S. 404 (1928) 12

J. K. Dering Coal Co. v. Cleveland, C. C. & St. L. Ry. Co., 206 I.C.C. 661 (1935) ..... 12

Powell v. United States, 300 U.S. 276 (1937) ..... 13

St. Louis S.W. Ry. v. Mo. Pac. R. Co., 289 U.S. 76 (1933) 13

Texas & Pac. Ry. v. Gulf, etc., Ry. 270 U.S. 266 (1926) .. 7, 8

### Statutes

Title 28 U.S.C., Section 1254(1) ..... 1

National Transportation Policy [49 U.S.C., preceding §1] ..... 7

Section 1(9), Interstate Commerce Act, [49 U.S.C. §1(9) ] .....11, 12

Section 1(18), Interstate Commerce Act, [49 U.S.C. §1(18) ] .....2, 3, 7, 8, 9, 10, 11, 12, 13

Section 1(19), Interstate Commerce Act, [49 U.S.C. §1(19)] ..... 2

PAGE

Section 1(20), Interstate Commerce Act, [49 U.S.C. §1(20)] ..... 2

Section 1(21), Interstate Commerce Act, [49 U.S.C. §1(21)] ..... 2

Section 1(22), Interstate Commerce Act, [49 U.S.C. §1(22) ] .....2, 6, 8

Section 3(1), Interstate Commerce Act, [49 U.S.C. §3(1)] ..... 13

Section 22, Interstate Commerce Act, [49 U.S.C. §22] .... 5

Section 206, Interstate Commerce Act, [49 U.S.C. §306] 10

Section 309, Interstate Commerce Act, [49 U.S.C. §909] 10

Section 1371, Federal Aviation Act, [49 U.S.C. §1371].... 10

IN THE

# Supreme Court of The United States

**October Term, 1964**

---

No. .....

---

THE NEW YORK CENTRAL RAILROAD COMPANY,
a Corporation,

*Petitioner,*

*v.*

SOUTHERN RAILWAY COMPANY,
a Corporation,

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on November 24, 1964.

### Citations to Opinion Below.

The opinion of the District Court, printed in Appendix A, *infra,* pp. A1-A26, is reported in 226 F. Supp. 463. The opinion of the Court of Appeals, printed in Appendix B, *infra,* pp. A28-A29, is reported at 338 F. 2d 667.

### Jurisdiction.

The judgment of the Court of Appeals was entered on November 24, 1964, Appendix B, *infra,* p. A30. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## Question Presented.

Since 1952 the Lynnville Mine of the Peabody Coal Company has been served by petitioner, the mine tipple being approximately 350 feet from petitioner's Tecumseh Branch, the construction of which was authorized in 1938 by the Interstate Commerce Commission under Section 1(18) of the Interstate Commerce Act. In 1958 respondent constructed one mile of track connecting the mine tipple and private track of the shipper. In January 1959 respondent, without securing approval of the Interstat Commerce Commission under Section 1(18), instituted common carrier operations to serve the mine over that mile of track and private track of the shipper, a total distance of approximately 10.5 miles. Petitioner commenced an action under Section 1(20) of the Interstate Commerce Act in the district court to enjoin the operation on the ground that it was an unauthorized extension in violation of Section 1(18) of the Act. Respondent thereafter sold the mile of track to the shipper for somewhat less than its cost of construction. The district court denied the injunction, and the court of appeals affirmed, on the ground that respondent's operation was not an extension within the meaning of Section 1(18) because respondent had expended none of its own funds for construction or use of the track.

The question is whether the public policy of the statute, which prohibits extension of railroad operations unless authorized by the Interstate Commerce Commission, should be frustrated by a new exception that makes Section 1(18) inapplicable unless there is an expenditure of railroad funds for construction or use of the tracks over which the extended railroad operations which invade territory served by another railroad are conducted?

## Statute Involved.

The statutory provisions involved are paragraphs 18 to 22 of Section 1 of the Interstate Commerce Act, 49

U.S.C. §§1(18) to (22). They are printed in Appendix C, *infra*, pp. A31-A34.

## STATEMENT.

Section 1(18) of the Interstate Commerce Act prohibits railroad extensions either through construction or operation unless and until the Interstate Commerce Commission authorizes such extension on a finding that ". . . public convenience and necessity require or will require the construction, or operation. . . .". On October 4, 1962, The New York Central Railroad Company (Central) brought a suit under the provisions of Sections 1(18)-(22) of the Act to enjoin Southern Railway Company (Southern) from serving the Lynnville Mine of Peabody Coal Company in violation of Section 1(18).

The following sketch will clarify the facts (R. 143).[1]

ONE MILE OF TRACK CONSTRUCTED IN 1958 BY SOUTHERN R R AND SOLD TO PEABODY IN 1962 AFTER SUIT WAS COMMENCED
INJUNCTION SOUGHT AGAINST SOUTHERN'S OPERATION OVER 10.5 MILES OF PEABODY TRACK TO ORIGINATE COAL TRANSPORTED TO INTERSTATE DESTINATIONS
TECUMSEH RD
N

[1] "R" refers to the appendix to petitioner's brief in the court of appeals.

Until 1938 no railroad served the coal field east of Central's line. In that year the Interstate Commerce Commission, acting under Section 1(18) of the Act, authorized construction of the Tecumseh Branch extending approximately 12.5 miles eastward from Central's main line at Buckskin, Indiana. In granting that authority the commission found that no other railroad served the same general territory and that the nearest railroad to the proposed line was the line of the Southern which was 7 or 8 miles distant at the nearest point. The commission also found that there was a public need for Central's transportation service to develop a virgin coal field that was without transportation facilities. *Cleveland, C. C. & St. L. Ry. Construction and Operation,* 228 I.C.C. 461, 462-463 (1938), (R. 136, 137, 139)

The cost of construction of New York Central's Tecumseh Branch was $422,000. (R. 138) The Lynnville Mine was opened in 1952 with its tipple located approximately 350 feet from the Tecumseh Branch (R. 183). During the years 1952 and 1953 Central expended an additional $253,000 for capital improvements in the vicinity of Lynnville for the sole purpose of providing rail service to the Lynnville Mine (R. 163). During 1962 Central originated 1,507,768 tons of bituminous coal at the Lynnville Mine which was approximately 7 percent of the 21,426,000 tons of coal originated by Central at all mines it served that year (R. 163).

In September, 1958, Southern constructed approximately one mile of track running southerly from the Lynnville Mine to a connection with private mine trackage. The cost of that construction was $26,381. (R. 89). In August, 1962, Southern gave notice that it was transporting coal from the Lynnville Mine to interstate destinations on its published tariff rates (R. 152). The through common carrier service begins at the mine. For its service, Southern receives a through line haul charge from the mine to the destination to which the coal is transported (R. 130).

Shortly after the aforementioned notice, Central filed its suit for an injunction.

After the suit was commenced, but before trial, Southern, by bill of sale, sold the mile of track to Peabody Coal Company for $25,000, which was less than it had cost to construct four and a half years earlier (R. 89). As a result of that transaction, Peabody Coal Company, at the time of the trial, owned the entire 10.5 miles of track from its Lynnville Mine to a connection with Southern. Southern operates over that track solely to serve the Lynnville Mine as a part of its common carrier transportation of coal on its published tariff rates to both interstate and intrastate destinations[2] (R. 130, 150-153). Southern bears

---

[2] Southern, as a common carrier railroad subject to the provisions of Part I of the Interstate Commerce Act (49 U.S.C. §1 *et seq.*) is prohibited from providing free transportation except for the governmental or charitable purposes specified in Section 22 thereof. Southern's operation over the Peabody Coal Company tracks between Boonville, Indiana and the Lynnville Mine is part of its through common carrier transportation of coal to numerous interstate destinations. A superintendent of the Southern Railway Company testified that the revenue the Southern Railway receives on traffic it originates at the Lynnville Mine is the "through line haul charge from that mine to the destination to which the coal is transported" (R. 130). Its common carrier status is further corroborated by Southern's own description of its operation as follows (R. 152):

> ". . . the service rendered the (Lynnville) mine is similar to that accorded any rail mine. *Empty cars are placed at the tipple and later picked up loaded and billed at the nearest practicable Agency.*
>
> ". . . Since all traffic moving in connection with proponent carrier (Southern Railway) is billed in the Boonville Group, the Boonville rate is applied. To portions of Indiana, Illinois, and Missouri, the rates from both groups are the same, however, in general, the rates to Wisconsin carry a 3¢ per ton differential, Boonville over Princeton. For example, *regular coal via proponent (Southern Railway) now carries a rate of 472¢ per ton to Madison, Wis., while coal from the same tipple would carry a rate of 469¢ to Madison via competing routes.*" (Parenthesis and emphasis supplied).

the expense of the train operations over the 10.5 miles of Peabody's track including the wages of train crews and the expense of locomotives and freight cars (R. 106-107, 112).

Southern has not sought nor obtained authority under Section 1(18) of the Interstate Commerce Act to operate over that trackage or to serve the Lynnville Mine. Central prayed only that the operation be enjoined unless or until the Interstate Commerce Commission should authorize the operation on a finding that it is in the public interest as defined in the statute.

The district court denied the injunction against Southern, holding:

> ". . . that the operation of trains by a carrier over private track owned and maintained by the mine or industry exclusively served by the carrier over that track is not an extension of line within the meaning of section 1(18), where the carrier does not serve or hold itself out to serve the general public over that track. No decision directly in point has come to my attention. . .". (Appendix A, *infra*, pp. A9-A10)

The district court also held:

> ". . . that while the element of carrier competition is logically relevant in deciding whether track to be constructed by a carrier is industrial track within the meaning of paragraph 22—the issue in Texas & Pacific —, it is not logically relevant in deciding whether movement of a carrier's cars over track built, owned and operated by a shipper (exclusively to serve the shipper) is an extension of the carrier's line." (Appendix A, *infra*, p. A15)

The district court did not hold that Southern's operation for a distance of 10.5 miles to serve the Lynnville Mine came within the Section 1(22) exception from the pro-

visions of Section 1(18), but rather held that the expenditure of carrier funds for construction or use of tracks is a "crucial consideration" i.e., a threshold requirement which, if absent, prevents application of Section 1(18). (Appendix A, *infra*, pp. A17, A18-A19) The court below affirmed *per curiam*, adopting the opinion of the district court. (Appendix B, *infra*, p. A-28)

**Reasons for Granting the Writ.**

1. The question presented is of great practical importance in the regulation of railroads. The decision below is virtually a license for the undisciplined raiding of traffic contrary to the broad and comprehensive congressional plan for the regulation of railroads. Rail rates, safety, financing and many other aspects of operation are regulated for the purpose of providing a sound transportation system (National Transportation Policy, 49 U.S.C. preceding § 1). Included in this regulatory plan is the restriction on the right to enter into the field of common carrier rail transportation and on the right to extend such operations. Similarly the right to abandon railroad operations is subject to Interstate Commerce Commission approval.

This Court, in *Texas & Pac. Ry.*, v. *Gulf, etc., Ry.*, 270 U.S. 266, at p. 277 (1926), stated the dual public purpose of Section 1(18) of the Interstate Commerce Act which prohibits extension of rail operations as being: (1) the prevention of waste of rail resources caused by the building of unnecessary lines of railroad, and (2) the preservation of earning capacity of individual carriers. Referring to the second aspect of the statutory purpose the opinion holds "that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury on its rival, it may be the

public which ultimately bears the loss." (270 U.S. 266 at p. 277).[3]

Congress provided the only exceptions to Section 1(18) of the Act in Section 1(22). However, the opinion below

---

[3] This Court's interpretation of Section 1(18) in the *Texas & Pacific* case is as follows:

> ". . . A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return, that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. (citations omitted) The Act sought, among other things, to avert such losses." (270 U.S. 266 at pp. 277-278).

The Court went on to say:

> ". . . But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks." (270 U.S. 266 at p. 278)

does not hold that Southern's operation comes within the exceptions in paragraph 22, but rather holds that the expenditure of carrier funds for track is a "crucial consideration" which, if not satisfied, prevents operation of paragraph 18 and prevents consideration of carrier competition as related to the second and equally important purpose of the statute (Appendix A, *infra*, p. A19). The practical result of that ruling is to excuse a wide area of railroad operations from the congressional standard that extended operations may not be conducted unless the Interstate Commerce Commission finds such operations to be required by the public convenience and necessity. If the decision below stands, railroads that have made large capital investments to serve industrial plants and mines on the reasonable expectation that they would handle the rail shipments to and from those plants will have their investments jeopardized even though their service adequately satisfies all of the shipper and public needs for rail transportation.

2. The district court's narrow interpretation of Section 1(18) which holds the statute to be non-applicable unless there is an expenditure of carrier funds for construction or use of track is in conflict with one of the purposes of that statute and the purpose of statutes modeled thereafter which regulate the entry of carriers by other modes into the field of for-hire transportation. The Section 1(18) public purpose and congressional intent to regulate the proliferation of competition is also expressed in statutory provisions that regulate the entry of other modes of carriage into the transportation arena.

Under the Motor Carrier Act of 1935 (49 Stat. 543), the right to enter into the activity of for-hire motor carrier transportation over public highways is subject to obtaining authority from the Interstate Commerce Commission on a finding that such motor carrier service is required

for "the public convenience and necessity." (Interstate Commerce Act, Sect. 206; 49 U.S.C. § 306). Under the Transportation Act of 1940 (54 Stat. 898) water carriage is prohibited unless the commission shall issue a certificate of public convenience and necessity (Interstate Commerce Act, Sect. 309; 49 U.S.C. § 909). Similarly under the Federal Aviation Act of 1958 (72 Stat. 731), airlines cannot engage in domestic transportation without a finding by the Civil Aeronautics Board that the airline operation is required by public convenience and necessity (49 U.S.C. § 1371).

In the case of carriers by highway, waterway, or air, the element of carrier expenditure for right-of-way is not present. The purpose of regulation of entry into the field of for-hire transportation or expansion of operations by carriers of these other modes of transportation necessarily is the preservation of earning capacity of existing carriers, and that is one of the purposes of Section 1(18) of the Act.

**3.** The opinion below conflicts with the rationale of decisions of this and other courts in which the competitive aspect of Section 1(18) of the Interstate Commerce Act has been the dominant and determining factor in deciding whether an operation or construction constituted an extension of line. The table in Appendix D, *infra*, pp. A36-A37, sets forth the findings as to length of track and cost of construction in Section 1(18) cases. Cases cited there hold that there was no extension in spite of expenditures of $772,000 and $315,000. Other cases involving expenditures of $15,500 and $25,000 were held to be extensions. In four of the cases cost of construction was not mentioned.

If regulation of expenditure of carrier funds was the sole or principal purpose of Section 1(18) of the Act, it would appear that there is no consistency in the decisions thereunder. However, the cases are consistent and the

unifying principle of those cases is the emphasis placed by the courts on the invasion of territory to which the new operations were proposed. In the thirteen cases which enjoined extensions, the courts found that there was an invasion of territory already served by another railroad. In each of the five cases which held there was no extension, the courts found there was no invasion of territory or that the defendant already served the territory.

The rationale of the decision below which finds expenditure of carrier funds to be the crucial consideration is contrary to judicial interpretation of the statute for almost 30 years. That the cases cited in Appendix D hereto involved expenditure of railroad funds for track does not detract from the judicial interpretation which recognizes the congressional purpose of protecting existing railroads from new rail competition unless the Interstate Commerce Commission shall authorize the new competion.

**4.** The district court, while stating that no decision directly in point had come to its attention, erroneously treated *Cleveland, C.C. & St. L. Ry.* v. *United States,* 275 U.S. 404 (1928) as persuasive precedent (Appendix A, *infra,* p. A10). However, that case involved the validity of an order of the Interstate Commerce Commission under another statutory provision and is not precedent on the question presented by this petition.

The decision of this Court in the *Cleveland* case, *supra,* was in a suit by the railroad to set aside an order of the Interstate Commerce Commission under Section 1(9) of the Act [49 U.S.C. § 1(9) ]. That paragraph provides that shippers have a right to a switch connection between their private track and common carrier railroad track if the business would justify the expenditure and the switch connection would be safe and reasonably practical (Appendix C, *infra,* p. A35).

The commission order involved therein was entered in *Dering Coal Co.* v. *Cleveland C.C. & St. L. Ry. Co.*, 96 I.C.C. 143; 109 I.C.C. 55 (1926). The order, which required the railroad to construct and operate a switch connection with the shipper's track, specifically found as a matter of fact that the shipper had made provision for the receipt of empty cars from and the delivery of loaded cars to the railroad at the point of switch connection. (96 I.C.C. 143 at p. 146) The order of the commission, which was before this Court, did not require or contemplate operation by the railroad over private tracks to serve the Dering mine and this Court found that the order gave the railroad no rights to operate over Dering's private tracks (275 U.S. 404 at p. 409).

In seeking to have the commission's order under Section 1(9) of the Act set aside, the railroad there contended that paragraph 9 was abrogated by subsequently enacted paragraphs 18 to 22. This Court rejected that argument holding that paragraphs 18 to 21 "relate to the construction, acquisition, extension, and abandonment of a railroad" and that they "deal primarily with rights sought to be exercised by the carrier, as contrasted with paragraph 9 "which relates to switch connections with private sidings built by the shipper" (275 U.S. 404 at p. 408).

The Court's opinion in the *Cleveland* case, *supra*, which holds that paragraph 9 is not abrogated or limited by paragraph 18 does not hold that paragraph 18 is inapplicable merely because there is a switch connection between track owned by a railroad and track owned by a shipper. Moreover, that opinion does not hold that expenditure of carrier funds for track is essential for application of paragraph 18.

The district court also erroneously relied on a later report of the Interstate Commerce Commission involving the Dering Coal Company. In *J. K. Dering Coal Co.* v.

*Cleveland, C.C. & St. L. Ry. Co.*, 206 I.C.C. 661 (1935), the commission, acting solely under Section 3(1) of the Act[4] [49 U.S.C. § 3(1) ], required the railroad to serve the Dering mine over the mine track between the point of switch connection and the mine tipple. That order was never reviewed by the courts. Under the rule of *Powell* v. *United States*, 300 U.S. 276 (1937), and *St. Louis S.W. Ry.* v. *Mo. Pac. R. Co.*, 289 U.S. 76 (1933), that report is not administrative precedent on an issue under Section 1(18) of the Act. In the *Powell* case, this Court held that, other than incident to a determination of whether it had jurisdiction in a proceeding under Section 1(18), the Interstate Commerce Commission does not have the power or authority to determine whether an extension of line is involved. (300 U.S. 276 at p. 287).

## CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

.....

RICHARD J. MURPHY
*Attorney for Petitioner,*
The New York Central
Railroad Company

1225 LaSalle Street Station
Chicago, Illinois 60605

---

[4] Section 3(1) of the Interstate Commerce Act deals with and prohibits undue prejudice among competing shippers, gateways, ports, localities, etc.

# APPENDIX

## INDEX TO APPENDIX


PAGE

APPENDIX A

Opinion and Judgment of the United States District Court, Northern District of Illinois, Eastern Division, dated February 5, 1964, reported at 226 F. Supp. 463 ..... A 1

APPENDIX B

Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit, dated November 24, 1964, reported at 338 F. 2d 667 ..... A 28

APPENDIX C

Paragraphs 18 to 22 of Section 1 of the Interstate Commerce Act [49 U.S.C. §§1(18) to (22)] ..... A 31

Paragraph 9 of Section 1 of the Interstate Commerce Act [49 U.S.C. §1(9)] ..... A 35

APPENDIX D

Table setting forth findings as to length of track and cost of construction in Section 1(18) cases [49 U.S.C. §1(18)] ..... A 36 - A 37

Chicago, M. St. P. & P. R. Co. v. Chicago & E. I., R. Co., 198 F.2d 8 (7th Cir. 1952)

Chicago, Milwaukee, St. P. & P. R. Co. v. Northern Pac. R. Co. 120 F. Supp. 710 (W.D. Wash. 1954) aff'd per curiam 225 F. 2d 840 (9th Cir. 1955)

Chicago, Milwaukee, St. Paul & Pacific R. Co. v. United States, 214 F. Supp. 244 (D.C. E.D. Wisc. 1963) probable jurisdiction noted March 9, 1964, 376 U.S. 941

Chicago, Rock Island & Pac. R. Co. v. Chicago & N. W. Ry. Co., 188 F. Supp. 549 (S.D. Ill. 1960)

Chicago, R. I. & P. R. Co. v. Illinois Commerce Commission, ex rel. Illinois Cent. R. Co., 111 N.E. 2d 136 (Sup. Ct. Ill. 1953)

Chicago, Rock Island & Pacific Railroad Co. v. United States, 205 F. Supp. 378 (D.C. N.D. Ill., E. D. 1962)

Detroit & M. Ry. Co. v. Boyne City G. & A. R. Co., 286 F. 540 (E.D. Mich. 1923)

El Dorado & W. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 5 F. 2d 777, (8th Cir. 1925)

State of Georgia v. United States, 156 F. Supp. 711 (N.D. Ga. 1957), aff'd per curiam 356 U.S. 273 (1958)

Missouri K. & T. R. Co. v. Texas & N. O. R. Co., 172 F. 2d 768 (5th Cir. 1949)

Missouri Pac. R. Co. v. Chicago, R. I. & P. Ry. Co., 41 F. 2d 188 (8th Cir. 1930)

Missouri Pac. R. Co. v. St. Louis Southwestern Ry. Co. 73 F. 2d 21 (8th Cir. 1934)

New York Central R. Co. v. Chicago & Eastern Ill. R. Co., 222 F. 2d 828 (7th Cir. 1955)

New York Central v. Norfolk & Western Ry. Co., 214 F. Supp. 549 (S.D. W. Va. 1963)

Pennsylvania Railroad Co. v. Reading Company, 132 F. Supp. 616 (D.C. E.D. Pa., 1955), aff'd per curiam 226 F. 2d 958 (3rd Cir. 1955)

Southern Pac. Co. v. Western Pacific California R. Co., 61 F. 2d 732 (9th Cir. 1932)

Texas & Pac. Ry. v. Gulf, etc., Ry., 270 U.S. 266 (1926)

Union Pac. R. Co. v. Denver & Rio Grande Western R. Co., 198 F. 2d 854 (10th Cir. 1952)

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE NEW YORK CENTRAL RAILROAD COMPANY, a corporation
*Plaintiff,*
*vs.*
SOUTHERN RAILWAY COMPANY, a corporation,
*Defendant.*
No. 62 C 1849

February 5, 1964

MEMORANDUM OF DECISION

JULIUS J. HOFFMAN, District Judge. In this suit the plaintiff, The New York Railroad Company, seeks to have the court enjoin the defendant, Southern Railway Company, from operating over private mine trackage owned by the Peabody Coal Company, running between Southern's Boonville, Indiana, agency station and Peabody's Lynnville Mine, and it is also sought to have the court restrain the defendant from serving that mine.

The action arises under section 1, paragraphs 18-22, of the Interstate Commerce Act, 49 U.S.C. Section 1(18)-(22). The plaintiff and the defendant are both common carriers by railroad operating in interstate commerce, and as such are subject to the provisions of Part I of the Interstate Commerce Act, 49 U.S.C. sections 1-27, including National Transportation Policy, 49 U.S.C., preceding section 1. The plaintiff and the defendant are duly authorized to do business as foreign corporations in Illinois, both

maintaining offices within the territorial limits of the District Court of the United States for the Northern District of Illinois, Eastern Division. This court thus has jurisdiction of the cause and of the parties.

THE PRINCIPAL FACTS

A portion of the plaintiff's line of railroad known as the Tecumseh Branch extends from a point known as Buckskin Station in Gibson County, Indiana, easterly to and through a point on its railroad known as Lynnville in Warrick County, Indiana, which is approximately five miles easterly of Buckskin station. The plaintiff constructed this branch under authority of a certificate of public convenience and necessity which it sought and obtained from the Interstate Commerce Commission in 1938. *Cleveland, C. C. & St. L. Ry. Construction and Operation,* 228 I.C.C. 461 (1938). In its report, the Commission found as follows:

> "The primary purpose of the proposed extension is to supply car and transportation service for coal to be mined from certain undeveloped coal lands in the so-called Dickeyville field, and particularly from a mine to be operated by the Tecumseh Coal Corporation, . . . which is now in the process of organization. . . . There is no other railroad serving the same general territory. The nearest railroad to the proposed line, other than that of the applicants, is the line of the Southern Railway extending from Evansville to Huntingburg, but it is about 7 or 8 miles distant at the nearest point.". . . .
>
> ". . . . The record shows a public need for the proposed construction in that it will develop a virgin coal field not now supplied with transportation facilities, and will result in a substantial increase in the business of the New York Central without diverting any traffic now handled by another line of railroad."

228 I.C.C. at 462-63.

Development of the coal lands in the area of the plaintiff's Tecumseh Branch led to the opening of the Lynnville Mine, now owned by Peabody. The coal tipple of that mine is located approximately 350 feet south of plaintiff's branch. The tipple was constructed during 1952 and commenced operation on December 7, 1952. In 1952 and 1953, the plaintiff expended $253,105.95 for capital improvements for track, communications, signals, and station facilities in the vicinity of Lynnville, for the purpose of providing rail service to the Lynnville Mine. During 1962, the plaintiff originated 25,679 carloads of bituminous coal at this mine, containing 1,570,768 tons of bituminous coal as compared with 21,426,315 tons of bituminous coal at all mines served by the plaintiff. During 1962, the tonnage of bituminous coal transportated by the plaintiff was 40.2 percent of the total tonnage of carload freight carried by the plaintiff during that year.

The defendant operates a line of railroad easterly from the City of Evansville in Vanderburgh County, Indiana, to and through a point on its railroad known as Boonville Station in Warrick County, Indiana, approximately seventeen miles east of Evansville. Southern constructed and for many years has owned and maintained a track approximately 1.4 miles long running northerly from its main line at Boonville, called Southern's Sunlight Spur. Peabody owns and mainstains a private track approximately ten miles long (hereinafter called the Peabody track) extending northerly from a connection with the old Sunlight Spur of Southern to the Lynnville Mine of Peabody. This track is located on land either owned by Peabody or over which Peabody has an easement for the track. The Peabody track, except for the last 5,150 feet at the northern end, was built at various times between 1945 and 1954. Various parties participated in the construction of the northerly 5,150 feet of track. On 2,150 feet, Peabody did the subgrading, construction, and spreading of ties in 1955; on

the other 3,000 feet, the sub-grading was done by the Olinger Construction Company in August, 1955. In September, 1958, at the request of Peabody, Southern completed the construction of the northerly 2,150 feet adjacent to the Lynnville Mine at a cost of $26,381, including the cost of material and labor. On April 8, 1963, Peabody paid to Southern $25,000, and in consideration thereof Southern gave Peabody a bill of sale for all its interest in the northerly 5,150 feet of the Peabody track. On January 10, 1959, the defendant commenced operations over the private Peabody track for the sole purpose of serving Peabody at the Lynnville Mine, and the defendant has not used the Peabody track to serve anyone except Peabody. The defendant has not applied for nor obtained certification under section 1(18) of the Interstate Commerce Act to operate over this trackage or to serve the Lynnville Mine.

THE ISSUES

The plaintiff alleges in its complaint that defendant's operation over the private Peabody track to serve the Lynnville Mine is an extension of defendant's line within the meaning of section 1(18) of the Interstate Commerce Act, which provides that no carrier subject to the Act shall undertake the extension of its line of railroad unless it first obtains a certificate of public convenience and necessity from the Interstate Commerce Commission. Section 1(20) of the Act provides that any construction, operation, or abandonment contrary to paragraph 18 may be enjoined by any court of competent jurisdiction at the suit of any party in interest. The plaintiff contends that under these provisions, the defendant should be enjoined from further operation over the Peabody track unless and until the defendant obtains proper certification from the Commission as required under paragraph 18.

The defendant denies, in its answer, that its operation from Boonville to Peabody's Lynnville Mine is an exten-

sion of its line within the meaning of section 1(18) and asserts that no authority from the Interstate Commerce Commission is required under section 1(18) for this operation. The defendant further alleges that it operates on the Peabody track to serve only the Peabody mine, that it has no right to use the Peabody track to serve anyone else, and that it does not hold itself out by tariff or otherwise to serve the general public over this track. Therefore, the defendant insists, this operation is merely a switching operation purely incidental to the roadhaul service of the defendant beyond Boonville, from which point the defendant's tariffs for roadhaul service apply.

The defendant further takes the position that by virtue of the private Peabody track which connects with the defendant's line, the Lynnville Mine is an industry located on the defendant's line; consequently, the defendant asserts, its operation to the Lynnville Mine does not constitute an invasion of the territory of the plaintiff, since the defendant is simply rendering switching service to an industry located on its line.

The parties have entered into stipulations which cover substantially all of the facts here involved. The only issues of fact raised are in regard to the relevancy and weight of certain evidence presented as well as the interpretation to be placed upon that evidence. The case was tried to the court without a jury and was taken under advisement on the trial record and memoranda submitted by counsel.

Both the plaintiff and defendant agree that the single issue to be decided in this proceeding is whether the defendant's operation over the private Peabody trackage to serve the Lynnville Mine constitutes an extension of line within the meaning of section 1(18) of the Interstate Commerce Act. This court has no jurisdiction to decide whether the defendant's service of the Lynnville Mine, if an exten-

sion of line within the meaning of section 1(18), is required by "the present or future public convenience and necessity." That question is the exclusive province of the Interstate Commerce Commission. *New York C.R.R.* v. *Norfolk & W. Ry.*, 214 F. Supp. 549, 554 (S.D.W.Va. 1963).

Section 1(18) provides, in pertinent part as follows:

> "No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad. . . ."

Section 1(22) provides, in pertinent part, as follows:

> "The authority of the Commission conferred by paragraphs (18) to (21) of this section, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State. . . ."

The plaintiff places principal reliance upon *Texas & Pac. Ry.* v. *Gulf, Colo. & S.F. Ry.*, 270 U.S. 266 (1926), in contending that the defendant's operation to serve the Lynnville Mine is an extension of the defendant's line of railroad under section 1(18). As the plaintiff states, the *Texas & Pacific* case is the landmark decision under paragraph 18 defining the difference between construction of an extension of line, for which Commission authority is required under paragraph 18, and construction of industrial trackage, wholly within one state, within the paragraph 22 exception. In that case, the Supreme Court, in an opinion by Mr. Justice Brandeis, held that proposed trackage, 7½ miles in length, to be constructed by the defendant carrier,

constituted an extension of line, where the line was to serve an industrial area not previously served by the defendant, and being served by the plaintiff. The defendant carrier argued

> ". . . that a branch is a line serving one or more stations beyond the point of junction with the main line or another branch, and to or from which stations regular tariff rates are in effect; that an industrial track is a line constructed to serve or reach industries over which regular scheduled passenger or freight train service is not performed and for transportation over which only a switching charge, if any, is made; and that neither the length of the line, nor the character of the construction, can convert into a branch a line of the nature described."

270 U.S. at 276-77. The defendant carrier, in support of its contention, relied upon definitions of these terms in use by the Interstate Commerce Commission for accounting purposes, and by the Commission, courts, and state legislatures for other purposes. In rejecting this definition, and promulgating its own definition of extension under section 1(18), the Court stated as follows:

> "A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the

public which ultimately bears the loss. See *Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U.S. 563; *The New England Divisions Case*, 261 U.S. 184; *The Chicago Junction Case*, 264 U.S. 258; *Railroad Commission* v. *Southern Pacific Co.*, 264 U.S. 331. The Act sought, among other things, to avert such losses.

"When the clauses in paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track become clear. The carrier was authorized by Congress to construct, without authority from the Commission, 'spur, industrial, team, switching or side tracks . . . to be located wholly within one State.' Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiary (sic) fitted to appreciate. Moreover, the expenditure involved is ordinarily small. But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks."

270 U.S. at 277-78.

The plaintiff urges that, under the above decision, the defendant's operation to serve the Lynnville Mine must be regarded as an extension of line because this mine or territory has not previously been served by the defendant and because it is already served by the plaintiff.

The difficulty with this theory is that it overlooks certain significant differences between the facts involved in the instant case and the facts involved in *Texas & Pacific*. In the latter, the defendant was to construct the projected trackage, own it, and operate it. The only question, therefore, was whether the defendant's construction of track fell within the purview of paragraph 22, excepting from the scope of paragraph 18 the construction of industrial track. The plaintiff cites a number of cases[1] which have followed the *Texas & Pacific* decision, but in none of them was the track involved wholly owned and operated by a party other than the carrier sought to be enjoined.

The defendant contends, and I agree, that other cases have demonstrated that the operation of trains by a carrier over private track owned and maintained by the mine or industry exclusively served by the carrier over that track is not an extension of line within the meaning of section 1(18), where the carrier does not serve or hold itself out

---

[1] Union Pac. R.R. v. Denver & R.G.W.R.R., 198 F.2d 854 (10th Cir. 1952); Missouri Pac. R.R. v. St. Louis S.W. Ry., 73 F.2d 21 (8th Cir. 1934); Southern Pac. R.R. v. Western Pac. C.R.R., 61 F.2d 732 (9th Cir. 1932); Missouri Pac. R.R. v. Chicago, R.I. & P. Ry., 41 F.2d 188 (8th Cir. 1930); New York C. R.R. v. Norfolk & W. Ry., 214 F. Supp. 549 (S.D. W.Va. 1963); Chicago, R.I. & P. Ry. v. Chicago & N.W. Ry., 188 F. Supp. 549 (S.D. Ill. 1960); Chicago, M., St. P. & P.R.R. v. Northern Pac. R.R., 120 F. Supp. 710 (W.D. Wash. 1954), *affirmed*, 225 F.2d 840 (9th Cir. 1955); Chicago, R.I. & P. Ry. v. Illinois Commerce Commission, 111 N.E. 2d 136 (Ill. 1953). Cf., Chesapeake & O. Ry. v. United States, 283 U.S. 35 (1931); El Dorado & W. Ry. v. Chicago, R.I. & P. Ry., 5 F.2d 777 (8th Cir. 1925); Gilmore v. Sandersville R.R., 149 F. Supp. 725 (1955).

to serve the general public over that track. No decision directly in point has come to my attention;[2] nevertheless, a consideration of various decisions concerning private tracks, together with the language of paragraph 18 and other portions of the Interstate Commerce Act, lead me to conclude that the operation here in question is not an extension of line of the defendant railroad under paragraph 18.

The most persuasive decisions discussed by the defendant in support of its position are a series of cases involving certain private track about three miles long constructed and maintained by the Dering Coal Company between its mine and the line of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, known as the "Big Four." The mine had previously been served by the Illinois Central, but the coal company desired improved service, and the Illinois Central did not oppose service of the mine by the Big Four. The track constructed by the coal company crossed the lines of the Illinois Central and the Southern Illinois Railway and Power Company, and for the privilege of these crossings the mine company granted both railroads the right to operate over its track for the purpose of serving mines located on the Big Four. Because of these agreements, the Big Four refused to install a switch connecting the Dering track with its line, which connection would enable the Illinois Central to reach mines on the Big Four line.

Dering applied to the Interstate Commerce Commission for an order under section 1(19) of the Interstate Com-

---

[2] Atlantic Coast Line R.R. v. Southern Ry., Civil Action No. 382 (S.D. Ga., Sept. 22, 1954), an unpublished opinion relied upon by defendant, appears to be closely in point; however, the opinion cites no authority and its holding may be explained by the principle followed in *Missouri, K. & T.R.R. of Texas* v. *Texas & N.O.R.R.*, 172 F.2d 768 (5th Cir. 1949), as well as by the theory here relied upon by defendant.

merce Act[3] compelling the Big Four to install a switch connection. The Commission, through Division 5, granted the order, *J. K. Dering Coal Co.* v. *Cleveland, C., C. & St. L. Ry.*, 96 I.C.C. 143 (1925), and on rehearing the full Commission affirmed, 109 I.C.C. 55 (1926). The order was ultimately upheld by the Supreme Court in *Cleveland, C., C. & St. L. Ry.* v. *United States*, 275 U.S. 404 (1928), in an opinion written by Mr. Justice Brandeis—author of the earlier *Texas & Pacific* opinion.

Two issues in that case, and the manner in which they were resolved, are significant for present purposes. The Big Four argued, first, that the Commission's power to

---

[3] Section 1(9) provides as follows:

"Any common carrier subject to the provisions of this chapter, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line railroad, such shipper or owner of such lateral branch line of railroad, may make complaint to the Commission, as provided in section 13 of this title, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section 15 of this title, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money."

order a carrier to make a switch connection with a private side track, under paragraph 9, had been abrogated by enactment of paragraphs 18 through 22. In rejecting this contention, the Court stated as follows:

> "Paragraph 22 in no way affects the power conferred by paragraph 9. By its terms, it operates as a limitation only upon the authority conferred upon the Commission in 1920 by paragraphs 18 to 21. *These paragraphs relate to the construction, acquisition, extension and abandonment of a railroad. They deal primarily with rights sought to be exercised by the carrier.* Compare *Railroad Commission* v. *Southern Pacific Co.*, 264 U.S. 331, 345; *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266; *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Ry. Co.*, 271 U.S. 244, 249. In denying their application to side tracks or spurs, paragraph 22 refers to tracks built by the carrier as part of its railroad. Compare *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U.S. 281, 285, 290. Paragraph 9, on the other hand, relates to switch connections with private sidings built by the shipper."

275 U.S. at 408. (Emphasis added.)

The Big Four argued, secondly, that the Commission order under paragraph 9 was void because it failed to comply with the requirements of paragraph 18. The Court stated as follows:

> "The contention has two phases. In the first place, it is said that if the switch connection is made, the side track, by enabling the Big Four to reach into territory hitherto served wholly by another carrier, will become an extension of its lines within the meaning of paragraph 18. . . . This argument proceeds from the same misconception of the purpose of paragraphs 18 to 21 as does the argument discussed above. *These paragraphs deal with construction and abandonment on the part of the carrier, not with side tracks built by the shipper. Furthermore the order gave the Big Four no trackage rights over the Coal Company's track. The*

> *mere fact that a side track with which a connection is sought extends to an industry located on another railroad does not make the switch connection or the track of the shipper, or both combined, an extension of the railroad within the meaning of paragraphs 18 to 21.*"

275 U.S. at 409. (Emphasis added.) The second phase of this contention was that because the Illinois Central and the Southern Illinois had the right to use the private track to reach mines on the line of the Big Four (although they had not yet exercised that right), there was an extension of the lines of those railroads without Commission authority. The Court stated, "If the track is used by the Illinois Central or the Southern Illinois in the manner described, paragraph 20 of section 1 furnishes the appellant with an appropriate remedy." Id. at 410.

The *Cleveland* opinion establishes that if Peabody itself transported its coal over its track in its own cars to Boonville, the defendant's service of Peabody could not be regarded as an extension of line under paragraph 18 even though the Lynnville Mine is located on the plaintiff's line. See also *Pennsylvania R.R.* v. *Pittsburgh, L. & W. R.R.*, 83 F.2d 861 (6th Cir.), *cert. denied*, 299 U.S. 572 (1936). Indeed, Peabody could compel defendant to install a switch connection at that point in a proceeding under paragraph 9, if the connection, in the words of that paragraph, were "reasonably practicable," could be "put in with safety," and would "furnish sufficient business to justify the construction and maintenance of the same." Note that these three factors are the only ones listed for the Commission to consider in determining whether to order a carrier to construct a switch connection with a private side track under paragraph 9. That another carrier serves the mine already does not excuse the carrier with which a connection is sought from making that connection. *Cleveland, C., C. & St. L. Ry.* v. *United States*, 275 U.S. 404, 412-13 (1928).

Subsequent to the *Cleveland* opinion, the coal company sought and obtained an order of the Commission compelling the Big Four, which had installed the switch connection involved in the previous litigation, to render service *at the mine*. The coal company alleged, and the Commission found, that the carrier rendered similar service to other mines similarly situated and in competition with it; thus the carrier's refusal to serve this mine in the same manner constituted undue preference and prejudice under section 3 of the Interstate Commerce Act, 49 U.S.C. section 3. In this proceeding, the Commission rejected the contention that because the mine was located on the line of another carrier, the Big Four had no obligation to serve the mine. The Commission further stated:

> "There is a clear distinction between a carrier serving a mine or industry over a private track constructed by the mine or industry to connect with the carrier's rails, and the extension of a carrier's service over a private track, as a bridge line, to reach mines or industries which have in turn built private tracks to connect with the bridge line. The latter is clearly a service for which a certificate would be necessary under section 1(18)."

*J. K. Dering Coal Co.* v. *Cleveland, C., C. & St. L. Ry.* 206 I.C.C. 661, 666 (1935).

If service at the mine, such as that rendered by defendant to Lynnville, can be compelled by the Commission where refusal to render such service constitutes a section 3 violation, and such service is not regarded as an extension under paragraph 18 in that situation, it would be illogical to hold that such service is an extension under paragraph 18 when rendered voluntarily.

The decisions involving the Dering track support the theory that where a carrier serves a mine over private track owned and maintained by the shipper, and does not

serve others over that track, the carrier operation is not an extension of line under paragraph 18.

The plaintiff contends that these decisions involving the Dering track are inapplicable because no competing carrier, standing to lose business as the result of service of the mine by the Big Four, objected to such service. The plaintiff notes that the factor of carrier competition was crucial in *Texas & Pacific* and that this factor was not considered in the Dering cases. It seems to me, however, that the factor of carrier competition would not have altered the results in these decisions. It would be difficult to reconcile the language of Mr. Justice Brandeis in the *Cleveland* opinion, quoted above, with the view that carrier competition would have altered the result. And, for reasons discussed hereinafter, that while the element of carrier competition is logically relevant in deciding whether track to be constructed by a *carrier* is industrial track within the meaning of paragraph 22—the issue in *Texas & Pacific*—, it is not logically relevant in deciding whether the movement of a carrier's cars over track built, owned, and operated by a *shipper* (exclusively to serve the shipper) is an extension of the carrier's line.

Authority of the Commission is required under paragraph 18 for a carrier to operate as a common carrier over private track, *i.e.*, where the carrier holds itself out by tariff or otherwise to serve the public thereover. See *Practices Affecting Dillonvale & Smithfield Ry.*, 229 I.C.C. 687 (1938); *Northern Pac. Ry. Operation*, 261 I.C.C. 631 (1946); *Acquisition of Line by Iberia & Vermilion R.R.*, 111 I.C.C. 660 (1926).

It would also appear that such authority is required if the carrier, although serving only the owner of the mine or industry involved, undertakes to maintain or assist in maintaining the track over which it operates. This use of the carrier's resources would bring the carrier within

the language of paragraph 18 prohibiting it "to operate any line of railroad, or extension thereof," without Commission authorization. This theory would explain, at least in part, the one case which the plaintiff has cited concerning operation of a carrier over private track.

In the first hearing of that case, *Wheeling & L.E. Ry. Operation,* 261 I.C.C. 37 (1945), the Commission refused to grant a certificate under paragraph 18 authorizing the applicant carrier to serve a single industry over the private track of the industry. The Commission report contains no discussion of jurisdiction; consequently, the case cannot be regarded as holding that the contemplated operation would constitute an extension of line under paragraph 18. The report discusses only those considerations relevant to the question whether the operation was required for public convenience and necessity. It is noteworthy, however, that the carrier, under the proposed plan, would have paid rental to the track owner for use of the track. The payment of such rental would involve the carrier in *operation* of a line, for which Commission authority is required under paragraph 18.

On rehearing, 261 I.C.C. 453 (1945), the Commission granted the authority sought. The plan presented on rehearing eliminated the rental agreement. Although the Commission did not so imply, and apparently the parties did not so urge, it seems logical to say that the projected operation considered on rehearing probably did not constitute an extension of line and no Commission authorization was required therefor.

No case has come to the court's attention in which the mere operation of a carrier over private track to serve the track owner has been considered "operation" of a line of railroad or extension thereof by the carrier. True, it is established in cases involving trackage rights that "There is nothing to suggest that the 'operation' for which

the commission's approval is required may not be by other than the owner or lessee of the line or that it is to be limited to exclusive use." *Transit Commission* v. *United States,* 289 U.S. 121, 128 (1933). But these cases typically involve the joint use of track under trackage rights, whereby a carrier engages in common carriage over the track and pays rental for use of the track. Such use constitutes "operation" within the meaning of paragraph 18. *Ibid.* That the expenditure of carrier funds is a crucial consideration in determining that "operation" by the carrier is involved was indicated by the Supreme Court in the *Transit Commission* case, *supra,* where the Court stated:

> "So far as concerns the purpose to be attained by this legislation, there is no room for a distinction between unjustificable *expenditures* for the construction or operation of new mileage, on the one hand, and *inadequate rentals or extortionate exactions* under trackage agreements, on the other. *The reasons for the exertion of federal authority, to the exclusion of state regulation, apply with like force to both.*"

*Id.* at 128. (Emphasis added.)

That "operation" under paragraph 18 is not achieved without the element of common carriage and/or the expenditure of carrier funds is also indicated by the Commission report in *Northern Pac. Ry. Operation,* 261 I.C.C. 631 (1946). There, the United States Navy had spent $7,500,000 to construct a railroad line to serve three naval installations. The Navy line connected with the Northern Pacific at Shelton, Washington. The Northern Pacific agreed to operate the Navy railroad as an integral part of its system, provided a certificate of convenience and necessity could be obtained from the Commission. By supplemental agreement, the parties agreed that, pending the granting of a certificate, Northern Pacific would operate the railroad solely for the Navy as a private contract carrier.

Operations commenced under the supplemental agreement, with the understanding that if the application were denied, the Government would reimburse the applicant for expenses incurred in its operation as a private carrier.

The Commission granted the requested certificate, under which the Northern Pacific undertook to conduct a common carrier operation and assumed all operating costs of the line. The Commission noted in its report:

> "If the application herein is granted, *the Navy will save the cost of maintaining and operating the line.* If the application is denied, contract-carrier operations by the Northern Pacific may be continued under the supplemental agreement, *but at the expense of the Navy* in addition to the rates which would apply to points on the line if common-carrier operation by the Northern Pacific is authorized."

261 I.C.C. at 642.

I conclude from these decisions that a carrier need not apply for Commission certification under paragraph 18 for operating over private track to serve the track owner, where the carrier does not engage in common carrier service over the track and where the carrier does not use its funds to maintain the track. The plaintiff's theory boils down to the view that the only factor required to make a carrier's operation over private track an extension of line is that another carrier will lose business as the result of the operation. I cannot agree, and the cases do not so hold. The question whether a carrier has invaded or threatens to invade "new territory" already served by another carrier—the carrier competition test enunciated in *Texas & Pacific*—is appropriate for the court to examine only after it is established that the "invading" carrier proposes to construct or operate, or is operating, some sort of road; the "new territory" question then becomes relevant in determining whether the track is within paragraph 18 or 22. But if the "invading" carrier does not operate

as a common carrier over the private track and does not use its funds to maintain the track or for the privilege of operating thereover, it is not operating any kind of road—branch, extension, spur or other—and does not fall within paragraph 18. The question of carrier competition, in this situation, is never reached.[4]

This result appears to be compelled by both the language of paragraph 18 and the policy of the Interstate Commerce Act. Unless the carrier operating over private track to serve the track owner serves the public over the track or makes some investment of its resources in the track, it is difficult to understand how the carrier could, thereby, "undertake the extension of its line of railroad, or . . . acquire or operate any line of railroad or extension thereof, or . . . engage in transportation under this chapter over or by means of such additional or extended line of railroad."

The principal evil which paragraph 18 was designed to eradicate was the waste of carrier funds through the building or extension of unnecessary lines, which, without any promise of profitable operation, and too often undertaken merely for profit from the sale of securities, became a burden upon the public. See extracts from the legislative history of section 1(18) - (22), in MacVeagh, The Transportation Act 1920, pp. 218-24, esp. 219 & 221 (1923). See also *Union Pac. R.R.* v. *Denver & R.G.W.R.R.*, 198 F.2d

[4] Another way of stating this point is that where a carrier serves a shipper over the latter's private track—or at a switch connection with the private track—the carrier is not invading the territory of another, because the shipper is in fact "located" on the line of the carrier in question. See Cleveland, C., C. & St. L. Ry. v. United States, 275 U.S. 404 (1928). It seems to me more logical, however, to say that the question of invasion is not reached at all where the carrier operation in question does not fall within the terms of paragraph 18. The question arises only when the terms of paragraph 18 apply and the exceptions of paragraph 22 are then invoked.

854, 858 (10th Cir. 1952); *Chicago, R.I. & Pac. R.R.* v. *United States,* 205 F. Supp. 378 (N.D. Ill. 1962). Decisions regarding paragraph 18 have consistently stressed the question whether the expenditure of funds by the carrier would be substantial. Marshall, *Railroad Certificates of Convenience and Necessity Issued Under the Interstate Commerce Act,* 22 Oregon L. Rev. 215, 250 (1943). See, *e.g., State of Georgia* v. *United States,* 156 F. Supp. 711, 717-18 (N.D. Ga. 1957), *affirmed,* 356 U.S. 273 (1958); *Chicago, M. St. P. & Pac. R.R.* v. *United States,* 214 F. Supp. 244, 248 (E.D. Wis. 1963); *Detroit & M. Ry.* v. *Boyne City, G. & A.R.R.,* 286 Fed. 540 (E.D. Mich. 1923).

The legislative history and the decisions also establish that destructive competition among carriers is a weighty consideration. But it seems to me evident from the scheme of the Act that while carrier competition is a most important consideration where the investment of carriers' funds is involved, such competition is not determinative where the investment of shippers' funds is involved. Thus, private construction for private transportation, though it may cause a loss of business to a common carrier, is not subject to the provisions of paragraph 18. *Pennslyvania R.R.* v. *Pittsburgh, L. & W.R.R.,* 83 F.2d 861, 864 (6th Cir.), *cert. denied,* 299 U.S. 572 (1936). The Interstate Commerce Act reflects a legislative policy for the protection not only of carriers and their interests, but also of shippers and their interests. At points, these interests inevitably conflict; thus, it appears entirely logical to apply a diversion-of-carrier-business test to determine whether track may be built, owned, or operated by a competing carrier without Commission authorization under section 1(18), but not to apply such a test where the track is built, owned, and operated by a shipper. Clearly, if the competing carrier serves the shipper only at the point of connection of the shipper's and carrier's lines, the carrier has not undertaken an extension of its line. *Cleveland, C., C. & St. L. Ry.*

v. *United States*, 275 U.S. 404 (1928); *Pennsylvania R.R.* v. *Pittsburgh, L. & W.R.R.*, 83 F.2d 861 (6th Cir.), *cert. denied*, 299 U.S. 572 (1936). Indeed, as has been shown above, the shipper can compel the carrier to provide a switch connection at that point under section 1(9), if certain specified criteria are met, *not* including the criterion of carrier competition or duplication of carrier facilities. It would be ludicrous, and subversive of the policy of the Act toward shippers, to hold that what the shipper can compel under section 1(9), cannot be rendered by the connecting carrier unless the carrier obtains a certificate of convenience and necessity under section 1(18). The concept of convenience and necessity is far broader than the criteria set forth in paragraph 9.

And I perceive no reason for a rule that the carrier, under these conditions, need not obtain a certificate of convenience and necessity to serve the shipper at the point where the switch connection is made, but must do so if it sends its cars for loading or unloading to the mine over track owned and maintained by the shipper. Such service is frequently rendered over private track and is generally regarded as merely incidental to the roadhaul service. See, *e.g.*, *Detroit & M. Ry.* v. *Boyne City, G. & A.R.R.*, 286 Fed. 540, 547 (E.D. Mich. 1923). Such service, moreover, can be compelled by the shipper where section 3 is applicable, and the carrier need not have Commission authority under paragraph 18 to render the service. *J. K. Dering Coal Co.* v. *Cleveland, C., C. & St. L. Ry.*, 206 I.C.C. 661 (1935). Similarly such service can be rendered through voluntary agreement between the shipper and carrier without Commission certification.

### The Facts In Issue

Having determined that a carrier has not undertaken an extension of line where it operates over private track to serve a shipper, unless the carrier (1) maintains a com-

mon carrier service thereover or (2) pays for the use or maintenance of the track, we may now examine the facts in issue, which bear upon whether the defendant falls within points (1) or (2) above.

The plaintiff regards as of great significance the fact that the defendant constructed, in part, the last 5,150 feet of the track in question. The plaintiff notes that the defendant spent $26,381 in constructing this segment in 1958, that Peabody bought it for $25,000, 4½ years later, and that the sale was made only after the plaintiff brought suit and served interrogatories regarding ownership of the Peabody track. The plaintiff concludes that until this suit was brought, the defendant regarded its investment in the track as adequately justified by the traffic it received from Peabody and did not intend to seek reimbursement. The plaintiff further maintains that the price paid by Peabody for the track in 1963 shows the defendant had regarded the track as an extension of line. The plaintiff asserts that the price was lower than the original cost to the defendant (rather than higher, reflecting the original cost plus interest) either because the price reflected deterioration of the track, showing that the defendant was regarded as the track owner before the sale, or because the price reflected the benefit which the defendant was receiving from Peabody traffic.

The evidence relating to the construction of this segment of track by the defendant does not establish that the defendant has undertaken an extension of line within the meaning of paragraph 18. Peabody requested that the defendant construct the track, Peabody has paid for the track, and Peabody has title to both the track and the right of way over which it runs. The defendant does not pay Peabody for operating over the track and has no trackage rights therein. The building of this segment was private construction by Peabody, the same as if Peabody had contracted with any other builder for the job. Private

construction for private transportation is not subject to the provisions of paragraph 18, *Pennsylvania R.R.* v. *Pittsburgh, L. & W.R.R.*, 83 F.2d 861 (6th Cir.), *cert. denied*, 299 U.S. 572 (1936), and the plaintiff does not argue to the contrary.

The evidence establishes that Peabody and the defendant contemplated that Peabody would give consideration for the construction of the track by the defendant, other than merely the "consideration" of benefits to the defendant from traffic from the Lynnville Mine. Prior to the construction, the parties to the transaction were considering an exchange of track, whereby, for construction of the new segment by the defendant, Peabody would transfer to defendant certain track, together with an easement on the right-of-way, connecting with the defendant's Sunlight Spur. (Tr., p. 35.) Both during and subsequent to construction of the track by the defendant, Peabody and the defendant carried on negotiations concerning payment for the track and discussed the defendant's operations thereover. (Tr. pp. 36, 64-65, 78; Defendant's exhibits 5, 6, 7, 8, & 9.) Eventually Peabody paid for the track a sum far too high to demonstrate that this was a sham transaction.

The plaintiff suggests that the defendant was attempting to obtain operating rights or trackage rights over the Peabody track in the course of these negotiations. Had the defendant obtained such rights, it might have "undertaken an extension of line" within the meaning of paragraph 18. But even if the defendant desired such rights, the fact is it did not obtain them. I cannot enjoin something that "might have been" had the negotiations come out differently.

Does the price which defendant accepted for the track somehow establish that the defendant has undertaken an extension of line? The plaintiff suggests that the defendant should have received $5,000.50 more than it got, which

sum would have reflected the cost of construction plus interest over the 4½ years between construction and payment. Clearly, the defendant lost some money in this transaction. But does this mean that the defendant has made an investment in the track amounting to an extension of line? For two reasons, I must answer no.

First, even if this is an "investment" in the track, the cases show that only a "substantial" expenditure qualifies to make a track expenditure an extension of line. See *e.g.*, *State of Georgia* v. *United States*, 156 F. Supp. 711, 717-18 (N.D. Ga. 1957), *affirmed*, 356 U.S. 273 (1958). This expenditure for track, if it can be so regarded, is not substantial. Compare, *e.g.*, *New York C.R.R.* v. *Norfolk & W. Ry.*, 214 F. Supp. 549 (S.D. W. Va. 1963); *Chicago, M., St. P. & Pac. R.R.*, 214 F. Supp. 244 (E.D. Wis. 1963).

Second, it appears to me inappropriate to regard the financial loss of the defendant in this transaction as an expenditure of funds for the track. Initially, a cash payment was not the consideration that the defendant hoped to receive. The defendant did finally receive cash consideration for the construction, and the price that Peabody was willing to pay could have reflected any number of considerations unrelated to the initial cost to the defendant. The value of the track to Peabody 4½ years after construction cannot necessarily be measured by the initial cost. The fact that the defendant could not drive a better bargain cannot be held, I think, to make its loss and expenditure for track amounting to an extension of line.

Plaintiff also contends that certain rate proceedings before the Illinois Freight Association establish that the defendant's operations over the Peabody track constitute an extension of line. On August 3, 1962, the defendant filed with the Illinois-Indiana Coal and Coke Committee of that Association a proposal suggesting the establishment of rates on coal from Lynnville to Madison, Wisconsin, for the defendant. The evidence shows, however, that

the listing of Lynnville as a point of origin for the defendant was a mistake, and that before any action was taken on the proposal by the committee, the defendant amended it to show the origin as Boonville, the proposed rate to apply on coal originating at Lynnville. The rate suggested in the amended proposal was rejected by the Association and was never put into effect.

This episode does not establish an extension of line. Even if the plaintiff's contention were correct, that the defendant desired tariff rates on Lynnville as a point of origin, the defendant withdrew the proposal and does not publish rates from Lynnville. It does not, therefore, hold itself out by tariff or otherwise as carrying on a common carrier operation from Lynnville. What the defendant might have desired does not alter the facts as they exist.

Finally, the plaintiff has argued that defendant obtained authority from the Interstate Commerce Commission under paragraph 18 for a certain operation over the Yankeetown Dock Corporation track running in a southerly direction from Boonville. The plaintiff apparently considers that because the Yankeetown Dock track, like the Peabody track, is privately owned, the defendant's action in obtaining Commission authority under paragraph 18 for operating over the former establishes that the defendant should have done likewise before operating over the latter.

Most of the evidence regarding the Yankeetown operation was excluded as irrelevant at the trial. It is appropriate to note, however, that the defendant's action in obtaining Commission approval for its operation over the Yankeetown Dock track is entirely consistent with its position in the instant case. In the Commission proceeding, the defendant sought to obtain and did obtain authority to acquire trackage rights, at established monthly rentals, and to operate as a common carrier over the Yankeetown Dock line.

*Southern Ry. Operation*, Finance Docket No. 19341 (Oct. 12, 1956). In the Lynnville operation, the defendant has no trackage rights, pays no rental, and does not operate as a common carrier.

Inasmuch as the plaintiff has failed to establish that defendant's operation over the Peabody track to serve the Lynnville Mine is an extension of line within the meaning of section 1(18), the plaintiff's prayer for injunctive relief is denied, and judgment will be entered for the defendant.

This memorandum of decision shall stand as the Court's findings of fact and conclusions of law within the meaning of Rule 52 of the Federal Rules of Civil Procedure.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

| | |
|---|---|
| THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation, *Plaintiff*, v. SOUTHERN RAILWAY COMPANY, a Corporation, *Defendant*. | Civil Action No. 62 C 1849 |

JUDGMENT ORDER

This action, having heretofore been submitted to the Court for a final decision for a permanent injunction, on the complaint of Plainitff, the answer of the Defendant to the said complaint, the stipulations of fact, testimony of witnesses for Defendant taken in open court, the various exhibits filed by each of them, and the memoranda of respec-

tive counsel for the parties to this action, and the Court having considered the pleadings, the orders previously entered herein, stipulations and exhibits and testimony, and the memoranda of respective counsel, is of the opinion that the relief prayed for in Plaintiff's complaint should be denied for the reasons and on the grounds set forth in the memorandum of decision filed by the Court on the 5th day of February, 1964, which are incorporated herein by reference.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED BY THE COURT that the complaint of Plaintiff herein be and hereby is dismissed for want of equity.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that the Plaintiff pay the costs of this proceeding and the costs incurred by the Defendant.

DATED this 5th day of February, 1964.

ENTER:

/s/ JULIUS J. HOFFMAN
*United States District Judge*

## APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

---

SEPTEMBER TERM, 1964—SEPTEMBER SESSION, 1964

---

No. 14666

THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation,
*Plaintiff-Appellant,*
v.
SOUTHERN RAILWAY COMPANY, a Corporation,
*Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

---

November 24, 1964

---

Before HASTINGS, *Chief Judge,* KNOCH and CASTLE, *Circuit Judges.*

PER CURIAM. The New York Central Railroad Company, plaintiff-appellant, brought this action in the District Court to enjoin Southern Railway Company, defendant-appellant, from operating over 11½ miles of track owned by Peabody Coal Company and which connects Peabody's mine near Lynnville, Indiana, with Southern's line at Boonville, Indiana, unless and until Southern obtains a certificate of public convenience and necessity from the Interstate Commerce Commission. The action is predicated upon the provisions of Section 1(20) of the Interstate Commerce Act (49 U.S.C.A. §1(20)). The issue arising from the

complaint and answer was whether the operation of Southern over the private track owned and maintained by Peabody was such that it constituted an "extension" of Southern's line of railroad within the meaning and application of Section 1(18) of the Act (49 U.S.C.A. §1(18)).

Substantially all of the facts involved were stipulated. The case was tried to the court which incorporated its findings of fact and conclusions of law in a memorandum decision reported as *New York Central Railroad Co.* v. *Southern Railway Co.*, (D.C.N.D. Ill., E.D.) 226 F. Supp. 463. The District Court entered a judgment order denying the injunctive relief sought, and the plaintiff appealed.

District Judge Julius J. Hoffman's opinion is well-reasoned and reflects both a discerning analysis of the issue presented for determination and a sound appraisal of the decisions relied upon by the parties as precedents pertinent to its resolution. Examination of the record satisfies us that the factual findings of the District Court are supported by substantial evidence and we are convinced that the court's conclusions represent applications of correct legal criteria. We adopt Judge Hoffman's opinion and affirm the judgment order of the District Court.

AFFIRMED

A true Copy:

Teste:

.....

*Clerk of the United States Court of Appeals for the Seventh Circuit.*

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60610

---

Tuesday, November 24, 1964

---

BEFORE

HON. JOHN S. HASTINGS, Chief Judge
HON. WIN G. KNOCH, Circuit Judge
HON. LATHAM CASTLE, Circuit Judge

THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation,
*Plaintiff-Appellant,*

No. 14666 v.

SOUTHERN RAILWAY COMPANY, a Corporation,
*Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment order of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

## APPENDIX C

## SECTIONS 1(18) THROUGH 1(22) OF INTERSTATE COMMERCE ACT [49 U. S. C. §§ 1(18) THROUGH 1(22)].

### Extension or Abandonment of Lines; Certificate Required; Contracts for Joint Use of Spurs, Switches, etc.

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission for the joint ownership or joint use of spur, industrial, team, switching or side tracks.

### Application for Certificate of Commission; Notice and Hearing.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to

hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

ISSUANCE OF CERTIFICATE BY COMMISSION; UNLAWFUL EXTENSION OR ABANDONMENT OF LINES.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected,

or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

POWER OF COMMISSION TO REQUIRE ADEQUATE FACILITIES OR EXTENSION OF LINE; PENALTY.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this part, and to extend its line or lines: Provided, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this part which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

CONSTRUCTION, ETC., OF SPURS, SWITCHES, ETC., WITHIN STATE.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team,

switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

## SECTION 1(9) OF INTERSTATE COMMERCE ACT [49 U.S.C. § 1(9)].

SWITCH CONNECTIONS AND TRACKS.

(9) Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

## APPENDIX D

### Analysis of Findings of Fact in Respect to Length of Track and Cost of Construction in Cases Under Section 1(18) of Interstate Commerce Act [49 U.S.C. § 1(18) ]

| *Case Title* | *Length of Track* | *Cost* | *Holding* |
|---|---|---|---|
| Chicago, M. St. P. & P. R. Co. v. Chicago & E. I. R. Co., 198 F.2d 8 (7th Cir. 1952) | 3.15 miles (198 F.2d at p. 11) | $315,000 (198 F.2d at p. 11) | Not an extension |
| Chicago, Milwaukee, St. P. & P. R. Co. v. Northern Pac. R. Co., 130 F. Supp. 710 (W.D. Wash. 1954) affirmed per curiam 225 F.2d 840 (9th Cir. 1955) | 3 miles (120 F. Supp. at p. 711) | $205,000 (120 F. Supp. at p. 711) | Extension |
| Chicago, Milwaukee, St. Paul & Pacific R. Co. v. United States, 214 F. Supp. 244 (D.C. E.D. Wis. 1963) probable jurisdiction noted March 9, 1964, 376 U.S. 941 | 262 feet (214 F. Supp. at p. 246) | $28,690 (214 F. Supp. at p. 246) | Not an extension |
| Chicago, Rock Island & Pac. R. Co. v. Chicago & N. W. Ry. Co., 188 F. Supp. 549 (S.D. Ill. 1960) | Less than one mile (188 F. Supp. at p. 550) | Not mentioned | Extension |
| Chicago, R. I. & P. R. Co. v. Illinois Commerce Commission, ex rel. Illinois Cent. R. Co., 111 N.E. 2d 136 (Sup. Ct. Ill. 1953) | Not mentioned | Not mentioned | Extension |
| Chicago, R. I. & P. R. Co. v. United States, 205 F. Supp. 378 (D.C. N.D. Ill., E.D. 1962) | 10,095 feet (205 F. Supp. at p. 379) | $231,900 (205 F. Supp. at p. 379) | Extension |
| Detroit & M. Ry. Co. v. Boyne City G. & A. R. Co., 286 F. 540 (E.D. Mich. 1923) | 3¾ miles (286 F. at p. 544) | $75,000 (286 F. at p. 544) | Extension |
| El Dorado & W. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 5 F.2d 777, (8th Cir. 1925) | 1,500 feet (5 F.2d at p. 777) | Not mentioned | Extension |
| State of Georgia v. United States, 156 F. Supp. 711 (N.D. Ga. 1957) affirmed per curiam 356 U.S. 272 (1958) | 2 miles (156 F. Supp. at p. 715) | $523,916 (156 F. Supp. at p. 714) | Extension |
| Missouri K. & T. R. Co. v. Texas & N. O. R. Co., 172 F.2d 768 (5th Cir. 1949) | 5,000 feet (172 F.2d at p. 770) | $30,000-$40,000 (172 F.2d at p. 770) | Not an extension |
| Missouri Pac. R. Co. v. Chicago, R. I. & P. Ry. Co., 41 F.2d 188 (8th Cir. 1930) | 3,700 feet (41 F.2d at p. 190) | $1,000,000 (41 F.2d at p. 193) | Extension |
| Missouri Pac. R. Co. v. St. Louis Southwestern Ry. Co., 73 F.2d 21 (8th Cir. 1934) | 5,100 feet (73 F.2d at p. 21) | $25,000 (73 F.2d at p. 21) | Extension |
| New York Central R. Co. v. Chicago & Eastern Ill. R. Co., 222 F.2d 828 (7th Cir. 1955) | 2,577 feet (222 F.2d at p. 830) | $30,000 (222 F.2d at p. 831) | Not an extension |
| New York Central R. Co. v. Norfolk & Western Ry. Co., 214 F. Supp. 549 (S.D. W.Va. 1963) | 1,020 feet (214 F. Supp. at p. 551) | $15,500 (214 F. Supp. at p. 552) | Extension |
| Pennsylvania Railroad Co. v. Reading Company, 132 F. Supp. 616 (D.C. E.D., Pa., 1955) affirmed per curiam 226 F.2d 958 (3rd Cir. 1955) | 1,877 feet (132 F. Supp. at p. 619) | $772,000 (132 F. Supp. at p. 620) | Not an extension |
| Southern Pac. Co. v. Western Pacific California R. Co., 61 F.2d 732 (9th Cir. 1932) | 10,000 feet (61 F.2d at p. 732) | Not mentioned | Extension |
| Texas & Pac. Ry. Co., v. Gulf, etc., Ry., 270 U.S. 266 (1926) | 7½ miles (270 U.S. at p. 275) | $510,000 (270 U.S. at p. 275) | Extension |
| Union Pac. R. Co. v. Denver & Rio Grande Western R. Co., 198 F.2d 854 (10th Cir. 1952) | 9,000 feet (198 F.2d at p. 855) | $62,000 (198 F.2d at p. 856) | Extension |

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 8 1965
JOHN F. DAVIS, CLERK

No. 887

# Supreme Court of the United States

OCTOBER TERM, 1964

THE NEW YORK CENTRAL RAILROAD COMPANY,
*Petitioner,*

*v.*

SOUTHERN RAILWAY COMPANY, *Respondent.*

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR RESPONDENT IN OPPOSITION

BRUCE E. BROWN
135 South LaSalle Street
Chicago, Illinois 60603

W. GRAHAM CLAYTOR, JR.
JAMES A. BISTLINE
Southern Railway System
P. O. Box 1808
Washington, D. C. 20013

WILLIAM H. ALLEN
Covington & Burling
701 Union Trust Building
Washington, D. C. 20005

*Attorneys for Respondent*

*Of Counsel:*

NORMAN J. GUNDLACH
First National Bank Building
East St. Louis, Illinois

March 1965

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | 1 |
| Statement | 1 |
| Reasons for Denying the Writ | 5 |
| Conclusion | 11 |


## INDEX TO CITATIONS

**Cases:**


*Cleveland, C., C. & St.L. Ry.* v. *United States*, 275 U.S. 404 (1928) ..... 5, 6, 7, 9

*J. K. Dering Coal Co.* v. *Cleveland, C., C. & St.L. Ry.*, 206 I.C.C. 661 (1953) ..... 8

*Rex Jellico Coal Co.* v. *Louisville & N.R.R.*, 237 I.C.C. 67 (1940) ..... 9

*Texas & Pac. Ry.* v. *Gulf, Colo. & S.F. Ry.*, 270 U.S. 266 (1926) ..... 8, 9

*United States* v. *Aberdeen & R.R.R.*, 289 I.C.C. 49 (1953), *aff'd sub nom. United States* v. *ICC*, 352 U.S. 158 (1956) .. 8

*Winnsboro Granite Corp.* v. *Southern Ry.*, 176 I.C.C. 481 (1931) ..... 8


**Statutes:**

Interstate Commerce Act


§ 1(9) ..... 5

§ 1(18) ..... 1, 3, 4, 5, 6, 7, 8, 10

§ 1(20) ..... 3

§ 1(21) ..... 5

§ 1(22) ..... 3, 4, 5, 8

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 887

THE NEW YORK CENTRAL RAILROAD COMPANY,
*Petitioner,*

*v.*

SOUTHERN RAILWAY COMPANY, *Respondent.*

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR RESPONDENT IN OPPOSITION

### QUESTION PRESENTED

Whether, under Section 1(18) of the Interstate Commerce Act, a railroad must obtain from the Interstate Commerce Commission a certificate of public convenience and necessity in order to serve one shipper over tracks owned and maintained by that shipper.

### STATEMENT

Respondent is an interstate common carrier by rail. One of its lines of track is in Indiana, running, so far as relevant here, from Evansville to Huntingburg by

way of Boonville. Near Boonville a spur track about a mile and a half long takes off from respondent's main line of tracks, running north. Connecting with respondent's spur track is a private track about ten miles long owned by the Peabody Coal Company and running to that company's Lynnville mine.[1] Except for a little less than a mile of track nearest to the mine this track was built between 1945 and 1954. (Pet. App. 3). The various sections were built by or for Peabody or a predecessor in interest. Peabody owns the land on which the track is located or has appropriate easements. (*Ibid.*) As for the last 5,150 feet of track, Peabody itself did the subgrading and spread ties on 2,150 feet, and a construction company working for Peabody subgraded the remaining 3,000 feet in 1955; at Peabody's request respondent completed the construction of the track in 1958, for which it was paid, after negotiations over the mode and terms of payment, in 1963. (*Id.* at 3-4). At the time of the trial in this case the entire ten miles of track was owned and maintained by Peabody.

Respondent began serving the Lynnville mine over the spur and the ten miles of Peabody's privately-owned track in 1959. It does not use the track for any other purpose. (*Id.* at 4). Its tariffs cover only the movement of coal from Boonville, on its line, to the point of destination.

The Lynnville mine is close to a branch line of the petitioner, also a common carrier by rail, that was constructed in the late 1930's in order to serve the mine field in which the Lynnville mine is located. A sub-

[1] The sketch at Pet. 3 provides an adequate orientation to the geography of the case.

stantial amount of coal is shipped from this mine on petitioner's railroad. (*Id.* at 2-3).

On October 4, 1962, petitioner brought suit in the District Court for the Northern District of Illinois under Section 1(20) of the Interstate Commerce Act, seeking an injunction that would prevent respondent from serving the Lynnville mine. Section 1(20) provides that at the suit of the United States, the Interstate Commerce Commission, a state regulatory commission or any party in interest a court may enjoin construction or operation of a line of railroad that is in violation of Section 1(18) of the Act. Section 1(18) provides that no railroad subject to the Act "shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad," without obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity. Section 1(22) excepts from the certificate requirement construction of spur, industrial, team, switching or side tracks located wholly within one state. Neither the United States, the Interstate Commerce Commission nor any state body joined in petitioner's suit.

After trial the district court dismissed petitioner's complaint. The court reviewed at length relevant opinions of this Court, the lower federal courts and the Commission construing Section 1(18) and related sections of the Act. (Pet. App. 4-21). It concluded that where it operates over a private track owned by a shipper a carrier does not undertake an activity covered by Section 1(18) unless (1) it maintains a

common carrier service, *i.e.*, serves the public generally, over such track or (2) it pays for the use or maintenance of the track. The court found that the track in issue was owned and maintained by Peabody, including the last nine-tenths of a mile which respondent helped build. Petitioner had emphasized respondent's part in the construction of this length of track. The court found that Peabody had requested that respondent build the track, had paid for the track and had title both to the track and the right-of-way over which it runs. (*Id.* at 22). "The building of this segment was private construction by Peabody, the same as if Peabody had contracted with any other builder for the job." (*Ibid.*) The court found that respondent did not hold itself out as carrying on a common carrier operation from the Lynnville mine over Peabody's private track. (*Id.* at 25). Finally, it was found that respondent did not pay Peabody for operating over the track and had no trackage rights. (*Id.* at 22). On this analysis the operation of respondent over the Lynnville mine tracks was simply not an extension of respondent's line or otherwise covered by Section 1(18), and so the question whether the tracks were within one of the exceptions provided by Section 1(22) was not reached (*id.* at 18-19).

The Court of Appeals for the Seventh Circuit agreed with the district court's legal analysis and determined, upon an examination of the record, that its factual findings were properly supported. It therefore affirmed the judgment on the district court's opinion. (*Id.* at 28-29).

## REASONS FOR DENYING THE WRIT

The decision below is an application to the unique facts in issue of the terms of Section 1(18) of the Interstate Commerce Act as they have been construed by this Court since soon after that paragraph was added to basic transportation law by the Transportation Act of 1920. There is no conflict with decisions of other courts of appeals. What petitioner really seeks is further review by this Court of fact findings made by a district court and sustained by a court of appeals. The case, therefore, is plainly not within the criteria governing the exercise of this Court's discretionary jurisdiction on certiorari.

On the facts found by the district court this case is controlled by the decision of this Court in *Cleveland, C., C. & St.L. Ry.* v. *United States,* 275 U.S. 404 (1928). That case arose under Section 1(9) of the Interstate Commerce Act, which empowers the ICC, under certain conditions, to require a railroad to provide a switching connection with a shipper's private line. The Commission entered an order requiring a railroad to make a switching connection with a three-and-a-half mile track a shipper had built from a mine located on another railroad. In this Court the railroad that had been ordered to make the connection argued that the power of the Commission under Section 1(9) had been abrogated by the subsequently enacted Section 1(22) and that in any event an order of the Commission under Section 1(9) must comply with the requirements of Sections 1(18) through (21). In response to these contentions this Court held that the paragraphs of Section 1 that were invoked there and that govern here "deal primarily with rights sought to be exercised by the carrier," 275 U.S. at 408, and that they "deal with

construction . . . on the part of the carrier, not with side tracks built by the shipper," 275 U.S. at 409.

> "The mere fact that a side track with which a connection is sought extends to an industry located on another railroad does not make the switch connection or the track of the shipper, or both combined, an extension of the railroad within the meaning of paragraphs 18 to 21." *Ibid.*

That, of course, is what Section 1(18) says. Its strictures run against a "carrier by railroad" undertaking "the extension of its line of railroad, or the construction of a new line of railroad," or acquiring or operating "any line of railroad, or extension thereof," or engaging in common carrier transportation "over or by means of such additional or extended line of railroad . . . ." It does not extend to shipper's tracks that are used only to serve that shipper.

Thus, only by an examination into the district court's findings of fact as to the status of the track in question and a conclusion that such findings were clearly erroneous can the rule of the *Cleveland* case be avoided here. This Court does not sit to review ordinary findings of fact, especially findings reviewed already by a court of appeals and found to be properly supported. In any case, the findings of the district court are amply supported. The evidence established, as the district court found, that Peabody and the respondent contemplated from the beginning that respondent would be its contractor in the construction of not quite a mile of track, that there were negotiations over price and other terms during and subsequent to the construction and that eventually Peabody paid "a sum far too high to demonstrate that this was a sham transaction." (Pet. App. 22-23). Indeed, petitioner's

only significant argument on this score is that the amount finally paid by Peabody was slightly less than the cost to respondent of the construction. But, as the district court found, "the price that Peabody was willing to pay could have reflected any number of considerations unrelated to the initial cost to" respondent, and the fact that respondent "could not drive a better bargain cannot be held, I think, to make its loss an expenditure for track amounting to an extension of line." (*Id.* at 24).

Petitioner suggests only one way in which the *Cleveland* case can be distinguished from this one. There it appears that the shipper was to deliver empty cars and receive loaded cars at the switching connection. (Pet. 12). Here respondent physically moves coal cars along the private track to the connection with its track. We are not informed, however, how this distinction is legally significant under the terms of Section 1(18). Indeed, petitioner never does come to grips with the language of the statute. Its appeal, even in its statement of the question presented, is to "the public policy of the statute." In fact, the distinction that petitioner draws has no legal significance. Respondent's use of the shipper's track to serve the shipper, which is customary in serving coal mines, does not make the shipper's track an extension of respondent's "line of railroad." It does not mean that a "line of railroad" owned and maintained by the shipper over which respondent has no trackage rights has been acquired or is operated by respondent. And, since the district court found that respondent does not hold itself out as a common carrier to and from Lynnville, respondent is within the established rule that "service over private tracks or plant-facility track

by a common carrier subject to our jurisdiction is neither compelled nor prohibited under the Interstate Commerce Act, and to furnish or withhold it is the discretion of the carrier." *United States* v. *Aberdeen & R.R.R.*, 289 I.C.C. 49, 65 (1953), *aff'd sub nom. United States* v. *ICC*, 352 U.S. 158 (1956); see also *Rex Jellico Coal Co.* v. *Louisville & N.R.R.*, 237 I.C.C. 67, 70-71 (1940); *Winnsboro Granite Corp.* v. *Southern Ry.*, 176 I.C.C. 481, 483 (1931).[2]

The district court did not need to reach the question most frequently litigated in borderline cases arising under Section 1(18) and related provisions of the Act. That question is whether a particular extension is within the exception provided by paragraph (22) for "spur, industrial, team, switching or side tracks . . . ."

The foundation decision to which courts turn in attempting to resolve the typical Section 1(18) question is, of course, *Texas & Pac. Ry.* v. *Gulf, Colo. & S.F. Ry.*, 270 U.S. 266 (1926). This is the case principally relied upon by petitioner here. It dealt with a line of tracks by which a carrier intended to reach "on its own rails" six plants served by another carrier. 270 U.S. at 275. In its opinion this Court held that the context and the policy of the Transportation Act of 1920, which introduced Sections 1(18) through (22) into the Interstate Commerce Act, provided the proper

[2] The carrier's freedom is subject to the prohibition in § 3 of the Act against undue preference or prejudice; if service over its track is rendered to one shipper, it may have to be rendered to competing shippers similarly situated. Acting pursuant to § 3, the Commission, some years after this Court's *Cleveland* opinion, ordered the railroad there involved to serve the shipper there involved over its track, without, of course, issuing any certificate of public convenience and necessity. J. K. Dering Coal Co. v. Cleveland, C., C. & St.L. Ry., 206 I.C.C. 661 (1935).

guide to definition of the terms used in paragraph (22). The policy, as it found expression in paragraphs (18) and (22), was that the building of unnecessary lines involves a waste of carrier resources, the burden of which may fall upon the public, and that competition between carriers may result in harm to the public as well as in benefit. 270 U.S. at 277-78. Thus, the question in the typical case is not whether a particular line of track or proposed line of track is in technical railroad parlance a spur or industrial or team or switching or side track. The question rather is whether such a line of track, owned or to be built by the carrier, extends the carrier into new territory, particularly territory served by another carrier, so that the ICC should determine whether nevertheless its construction would serve the public convenience and necessity. That was the question posed in the cases listed by petitioner (Pet. App. 36-37); all involved carrier-owned tracks.

But there is no such question when, at the threshold, it is determined the line of track is a private track, not an extension of a carrier's system or operated by it or used by it in common carriage. That is established by the *Cleveland* opinion, which was written by Mr. Justice Brandeis, author of the *Texas & Pacific* opinion as well and the authoritative expositor for this Court of the meaning of the Transportation Act of 1920. In the *Cleveland* case he took note of his earlier opinion and made quite clear that it did not govern where a shipper's tracks are involved. 275 U.S. at 409.

Petitioner wholly misconceives the ground of decision below when it says—to take one statement of a theme that recurs in the petition—that "the opinion below does not hold that Southern's operation comes

within the exceptions in paragraph 22, but rather holds that the expenditure of carrier funds for track is a 'crucial consideration' which, if not satisfied, prevents operation of paragraph 18 and prevents consideration of carrier competition as related to the second and equally important purpose of the statute. . . ." (Pet. 8-9; see also *id.* at 7, 10, 11, 12). The point of the decision below was not that the prevention of dissipation of carrier resources through wasteful expenditures for track construction is the overriding policy of Section 1(18). It was that there must be an extension or an operation of a railroad line *by the carrier* before 1(18) comes into play at all, and the fact that there has been no outlay of money by the carrier is certainly some evidence that a line of railroad is not its line of railroad.

To be sure, there might some time be a case in which some of the fears expressed by petitioner in its petition were real ones. The district court recognized this when it explicitly found that this was not "a sham transaction." (Pet. App. 23). Through a sham arrangement with a shipper a carrier could effectively extend its line and thereby dissipate its resources and invade the territory of another carrier. In such a case presumably formalities of ownership would not be allowed to stand in the way of effectuating the policy of Section 1(18). On the facts found, this is simply not that case.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

BRUCE E. BROWN
135 South LaSalle Street
Chicago, Illinois 60603

W. GRAHAM CLAYTOR, JR.
JAMES A. BISTLINE
Southern Railway System
P. O. Box 1808
Washington, D. C. 20013

WILLIAM H. ALLEN
Covington & Burling
701 Union Trust Building
Washington, D. C. 20005

*Attorneys for Respondent*

*Of Counsel:*

NORMAN J. GUNDLACH
First National Bank Building
East St. Louis, Illinois

March 1965

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 22 1965
JOHN F. DAVIS, CLERK

No. 887

# In the Supreme Court of the United States

OCTOBER TERM, 1964

THE NEW YORK CENTRAL RAILROAD COMPANY,
*Petitioner,*

vs.

SOUTHERN RAILWAY COMPANY,
*Respondent.*

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## REPLY TO RESPONDENT'S BRIEF

RICHARD J. MURPHY
1225 LaSalle Street Station
Chicago, Illinois 60605
*Attorney for Petitioner*

March, 1965

No. 887

# In the Supreme Court of the United States

OCTOBER TERM, 1964

THE NEW YORK CENTRAL RAILROAD COMPANY,
*Petitioner,*

vs.

SOUTHERN RAILWAY COMPANY,
*Respondent.*

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## REPLY TO RESPONDENT'S BRIEF

Respondent suggests that petitioner seeks a review by this Court of fact findings made by the district court (Resp. Brief, p. 5). That is not the case. As the court of appeals noted, substantially all of the facts were stipulated. No issue of fact is raised by the petition and respondent does not dispute the statement of facts set forth in the petition.

The petition presents a question of law of great importance in the regulation of railroads, *i.e.*, whether section 1(18) which prohibits extension of railroad operations unless authorized by the Interstate Commerce Commission is inapplicable unless there is an expenditure of railroad funds for construction or use of the tracks over which the extended operations are conducted to invade territory served by another railroad. The result of the ruling below is to excuse railroads from the requirement that extended operations may not be conducted without commission permission

and is virtually a license for the undisciplined raiding of traffic contrary to the purpose of the statute as set forth by this Court in *Texas & Pac. Ry.* v. *Gulf, Colo. & S. F. Ry.*, 270 U.S. 266 (1926).

Respondent incorrectly states that petitioner misconceives the ground of the decision below (*Id.* at 9-10). Respondent correctly sets forth the rule of law applied below, stating that the court:

> " . . . concluded that where it operates over a private track owned by a shipper a carrier does not undertake an activity covered by Section 1(18) unless (1) it maintains a common carrier service, *i.e.*, serves the public generally, over such track or (2) it pays for the use or maintenance of the track." (*Id.* at 3-4)

Petitioner stated that neither of the alternate requirements of that ruling were met[1] but asserts that by its ruling, the district court erroneously held that expenditure of carrier funds for construction or use of tracks to serve one shipper is a threshold requirement which, if absent, prevents application of section 1(18). The above quoted holding makes it clear that the expenditure of carrier funds was held to be essential. The court characterized carrier expenditure as a crucial consideration (Pet. App. 17).

Respondent states that it does not operate a line of railroad within the scope of the statutory language of section 1(18) (Resp. Brief, p. 6), and that petitioner does not come to grips with the language of the statute (*Id.* p. 7). The broad sweep of the statutory language

---

[1] " * * * Peabody Coal Company, at the time of the trial owned the entire 10.5 miles of track from its Lynnville Mine to a connection with Southern. Southern operates over that track solely to serve the Lynnville Mine as part of its common carrier transportation of coal on its published tariff rates to both interstate and intrastate destinations." (Pet., p. 5).

(Pet. App. 31) includes operation by a railroad over tracks which it does not own. In *Transit Comm.* v. *United States,* 289 U.S. 121 (1933), this Court held that:

> " * * The phrase 'to operate any line of railroad' seems sufficient to include such use. There is nothing to suggest that the 'operation' for which the commission's approval is required may not be by other than the owner or lessee of the line or that it is to be limited to exclusive use." (289 U.S. at p. 128).

In the *Transit* case, this Court held that the Interstate Commerce Commission had exclusive jurisdiction under section 1(18) to prescribe the terms of a trackage agreement including the rental for the use of the track. In construing the statute there this Court looked to its purpose, stating that the Act, including section 1(18), is to be "construed to make federal authority effective to the full extent that it has been exerted and with a view of eliminating the evils that Congress intended to abate." (289 U.S. at p. 128).

In *Texas & Pacific Ry.* v. *Gulf, Colo. & S. F. Ry., supra,* this Court stated the dual purpose of section 1(18) as (1) the prevention of waste of rail resources caused by the building of unnecessary lines of railroad, and (2) the preservation of earning capacity of individual carriers. Referring to the second aspect of the statute that opinion holds "that competition between carriers may result in harm to the public as well as in benefit" (270 U.S. at 277). The *Transit* case holds that the statute requires achievement of the first purpose of section 1(18) in situations where the railroad operations were not over its own track. Contrary to respondent's contention the statute includes railroad operation over a shipper's tracks and requires realization of the second and equally important purpose of section 1(18) as stated in the *Texas and Pacific* case.

Respondent argues that this case is controlled by the decision of this Court in *Cleveland, C. C. & St. L. Ry.* v. *United States,* 275 U.S. 404 (1928), discussed at pages 11-13 of the petition. The district court, while treating that case as persuasive, noted that it was not in point (Pet., App. 10). The *Cleveland* case was a suit to set aside an order of the Interstate Commerce Commission under a different section of the Act and is not precedent on the question presented here.

Respondent cites *United States* v. *Aberdeen & R. RR.,* 289 I.C.C. 49, 65 (1953), aff'd. sub nom., *United States* v. *I. C. C.,* 352 U.S. 158 (1956); *Rex Jellico Coal Co.* v. *Louisville & N. R.R.,* 237 I.C.C. 67, 70-71 (1940); *Winnsboro Granite Corp.* v. *Southern Ry.,* 176 I.C.C. 481, 483 (1931), in arguing that common carriers are free to operate over private or plant facility tracks (Resp. Brief, pp. 7-8). There was no issue under, or discussion of section 1(18) in those cases. Petitioner does not contend that common carrier railroads cannot operate over private or plant facility tracks. Indeed that is frequently done. Respondent concedes that such operations are subject to the prohibition against discrimination and prejudice contained in Section 3(1) of the Act. (*Id.* at 8) Such operations are also subject to Section 6. *United States* v. *U. S. Smelting,* 339 U.S. 186 (1950). Petitioner submits that a common carrier's operation of trains over a shipper's track also is subject to the requirements of section 1(18). The *Aberdeen, Rex Jellico,* and *Winnsboro* cases, *supra,* do not bear on that question.

Respectfully submitted,

RICHARD J. MURPHY,
1225 LaSalle St. Station
Chicago, Illinois 60605
*Attorney for Petitioner*

No. 887

Office-Supreme Court, U.S.
FILED
APR 20 1965
JOHN F. DAVIS, CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1964

THE NEW YORK CENTRAL RAILROAD COMPANY,
*Petitioner,*

vs.

SOUTHERN RAILWAY COMPANY,
*Respondent.*

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

RICHARD J. MURPHY
1225 LaSalle Street Station
Chicago, Illinois 60605
*Attorney for Petitioner*

April, 1965

No. 887

# In the Supreme Court of the United States

OCTOBER TERM, 1964

---

THE NEW YORK CENTRAL RAILROAD COMPANY,
*Petitioner,*

vs.

SOUTHERN RAILWAY COMPANY,
*Respondent.*

---

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of March 29, 1965 denying the petition for writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit in the above-entitled case as prayed for in the petition filed February 8, 1965, herein.

### Reasons for Granting Rehearing and Issuing the Writ

1. Since entry of this Court's order of March 29, 1965, the sharp conflict between the decision below and the decisions of this Court in respect to section 1(18) of the Interstate Commerce Act has crystalized. On April 5, 1965, this Court, in *Chicago & Northwestern*

*R. Co.*, v. *Chicago, Milwaukee, St. P. & P. R. Co.*, ..... U.S. ....., No. 21 October Term, 1964, reversed the lower court's opinion in *Chicago, Milwaukee, St. P. & P. R. Co.* v. *United States*, 214 F. Supp. 244 (E.D. Wis. 1963), citing *Texas & P. R. Co.* v. *Gulf, C. & S. F. R. Co.*, 270 U.S. 266, 278 (1926).

The decision below in No. 21 held that a 262 foot connecting line between two railroads was not an "extension of lines" requiring a certificate of public convenience and necessity from the Interstate Commerce Commission under section 1(18) of the Act because there was no "invasion of territory served by other railroads" (214 F. Supp. at p. 249). It follows that this Court's citation of the *Texas and P.* case in reversing No. 21 re-emphasizes the invasion of territory test as the crucial consideration in determining whether an operation constitutes an extension of line within the meaning of section 1(18).

In the instant case, the court below held that respondent's operation for a distance of approximately 10.5 miles to serve a mine tipple located 350 feet from petitioner's line of railroad was not an extension of line in spite of the fact that petitioner had served that mine tipple for 6 years before respondent commenced its operation; and in spite of the fact that the Interstate Commerce Commission in authorizing petitioner to build the line of railroad that is 350 feet from the mine tipple found that "there is no other railroad serving the same general territory" *Cleveland, C. C. & St. L. Ry. Construction and Operation*, 228 I.C.C. 461, 462 (1938). Clearly, respondent's operation is an invasion of territory. Clearly the lower court's opinion herein is in conflict with the test set forth in

the *Texas and P.* case and reiterated by this Court in reversing No. 21, October Term, 1964, subsequent to the denial of certiorari herein.

2. The question continues to be one of great practical importance in the interpretation of section 1(18) of the Interstate Commerce Act. The *Texas and P.* holding that invasion of territory is regulated by section 1(18), which test was reapplied by this Court this term, and the *Transit Comm.* v. *United States,* 289 U.S. 121 (1933), holding that under section 1(18) the congressional purpose of regulating extension of a railroad's operations is to be achieved even though the extended railroad operations are not over its own track, deal with a question of large importance in the regulation of railroads. The law on this question, however, is made uncertain by the decision of the court below and the denial of certiorari herein, which denial was followed shortly by the reversal in No. 21, October Term, 1964.

## CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

RICHARD J. MURPHY,
1225 LaSalle St. Station
Chicago, Illinois 60605
*Counsel for Petitioner*

April, 1965

## CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58 of the rules of this Court.

.....

*Counsel for Petitioner*